

Egregious conduct

When a worker is injured, we all work together to support the worker's safe recovery and return to work. But what happens if the employment relationship ends or is suspended due to the worker's egregious conduct after they return to work?

Legislation regarding egregious conduct came into effect on January 1, 2021. It applies to any egregious conduct that occurs on or after January 1, 2021, regardless of the worker's date of accident.

In the event modified work ends due to a worker's egregious conduct, WCB will pay benefits as though the modified work is still in place. This means if a worker's modified work is removed due to their own egregious behaviour, their entitlement to temporary wage loss benefits may be reduced or suspended. Only temporary benefits may be impacted.

WCB's decision is made only for the purpose of applying legislation. It does not affect your ability to set your company policies or your right to discipline your workers for actions that are contrary to those policies.

What qualifies as egregious conduct?

Canadian courts defined egregious conduct to mean conduct that is "flagrantly bad" or "staggeringly bad, or obviously wrong, beyond any reasonable degree." To classify as egregious behaviour, the worker's conduct must be outstandingly or flagrantly bad to a reasonable person.

To determine if a worker's conduct meets the definition of egregious conduct, WCB must consider the context in which the behaviour occurred. Would the facts of the behaviour and its context lead a reasonable person to consider the behaviour shockingly bad?

To provide the proper context for a decision, WCB will consider a number of factors. This may include, but is not limited to:

- If impairment was involved, was the worker physically and mentally incapable of performing their duties? How was their impairment determined and validated (e.g., medical test or visual identification) and how reliable is this mechanism?
- Was the conduct a deliberate, intentional act or an unintentional error?
- Did the worker fail to follow their employer's policies? Are those policies well known and consistently enforced?

- Has the worker done this before? If so, what disciplinary measures were taken at that time?
- What were the actual or potential consequences of the conduct? Did the conduct endanger the worker or others and/or cause injury or property damage?
- Are there any mitigating factors?

Circumstances that may involve egregious conduct include, but are not limited to, a breach of an employer or professional safety standard, rule, or policy; violence, including aggressive, threatening behaviour; sexual harassment or assault involving coercion, threats, or violence; deliberate destruction of property; fraud or embezzlement.*

If WCB determines the worker's conduct is not egregious, we will consider whether the conduct qualifies as a failure to cooperate.

**Termination for what the employer classifies as just cause may be appropriate disciplinary action, but it is not in-and-of-itself proof of egregious conduct.*

Frequently asked questions

1. What do I do if I think this policy applies to my situation?

If you think your worker's behaviour is egregious, contact the claim owner to discuss the situation *before* terminating the employment contract. If the claim owner determines egregious conduct legislation does not apply, they will evaluate the situation to ensure the worker has met their duty to cooperate.

If available, please share the following information with the claim owner:

- a copy of your employment policy effective on the date of your worker's accident,
- a copy of a document signed by your worker confirming they were aware of your policy and the consequences of failing to follow the policy,
- a copy of any documentation demonstrating you followed your policy consistently with other employees,
- any documents related to an internal investigation about the incident (e.g., interviews with the worker, other

employees, video footage, etc.),

- any other evidence to support that you followed the employment policy as outlined, and
- anything else the claim owner discussed with you specific to the egregious conduct incident.

2. Why don't you review benefits and services if the worker has permanent work restrictions?

Egregious conduct legislation was added to the section of the *Workers' Compensation Act* which speaks to only temporary disability benefits [Section 56 (13a)] and, as such, does not apply to permanent benefits.

If your worker has permanent work restrictions, we'll continue to work collaboratively on their return to work plan and keep you informed of any changes to their abilities and care plan.

3. How might this impact my experience rating?

Your worker may still be entitled to medical, rehabilitation or re-employment benefits. These costs will continue to contribute to your experience rating. As a result, we will continue to work collaboratively and keep you informed of any changes to their abilities and care plan.

Example scenarios

These examples demonstrate how we make decisions around egregious conduct. As with all claim decisions, each case is reviewed independently based on the specific and unique circumstances of each case. As you'll soon see, some cases are more clear-cut than others. That's why we look at each case individually.

Scenario 1: John

John was hurt at work and is on modified duties with his employer. On his lunch break, John got into a heated argument with his co-worker, Bill. After lunch, John pursued the argument despite Bill's attempts to end it. The situation escalated. John threatened Bill and swung at him with a shovel. Bill tried to walk away but John got into a visitor's running vehicle and drove erratically through the job site, chasing Bill.

The employer thinks John's conduct was egregious and intends to terminate his employment contract. Does John's conduct classify as egregious?

Given the circumstances, John's conduct was egregious. John's actions included threats, violence and theft of a visitor's property. A reasonable person would consider his conduct shockingly bad.

Scenario 2: Fatima

Fatima is employed at a convenience store, working modified duties while she recovers from a work injury. During her shift someone entered the store and demanded money from the cashier. Fatima tried to physically stop the robber from leaving the store. The thief fired a gun but no one was hurt.

Her employer's safety rules state that if a robbery takes place, workers are to follow instructions and not restrain or resist the robber. The employer feels Fatima's actions breached an important safety rule and endangered the lives of everyone in the store. In their opinion, Fatima's actions were egregious and the employer is planning to withdraw modified work. Does Fatima's conduct classify as egregious?

Likely not. While she breached her employer's safety rule which put people at risk, her heat-of-the-moment actions were in response to a frightening experience. Though inadvisable, she was attempting to protect the employer's property. A reasonable person is unlikely to consider Fatima's actions shockingly bad and Fatima's conduct is likely not egregious.

Still have questions? Please contact us toll-free at 1-866-922-9221.

